IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975

No. 67, Original

STATE OF IDAHO, ex rel CECIL D. ANDRUS, Governor; WAYNE L. KIDWELL, Attorney General; JOSEPH C. GREENLEY, Director, Department of Fish and Game

Plaintiff,

vs.

STATE OF OREGON, STATE OF WASHINGTON,

Defendants.

PLAINTIFF'S MEMORANDUM IN REPLY TO AMICUS CURIAE BRIEF OF UNITED STATES

Counsel for Plaintiff
WAYNE L. KIDWELL
Attorney General
State of Idaho

TERRY E. COFFIN
Deputy Attorney General
Statehouse
Boise, Idaho 83720

of counsel
MATTHEW J. MULLANEY, JR.

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This memorandum is submitted pursuant to the Court's request of March 22, 1976, that Plaintiff, State of Idaho, file a memorandum in reply to the amicus curiae memorandum of the United States filed previously in this matter. The United States has suggested that the Court not grant the motion to file the complaint at this time but should deny the motion without prejudice to the filing of the subsequent motion and complaint. (U.S. Memo-Page 2.) That suggestion is based on the United States' argument that the Oregon State Legislature has already passed a bill granting that State's consent for Idaho to join the

compact and that the bill has now become law. Chapter 709, Oregon Laws of 1975. Further, the United States argues that a bill similar to the one passed in Oregon was sponsored by the Governor of Washington and passed by the Washington House of Representatives by a vote of 93 to 5 and was recommended for passage by the pertinent Senate committee. The United States notes that the term of the legislature for the State of Washington ended before Senate approval of the bill.

Chapter 709, Oregon Laws of 1975, is in no manner acceptable to the state of Idaho for the reason that it does not adequately protect Idaho's interest in the steelhead runs. It allows each state one vote and the rule would be by "majority" vote. The bill allows the compact states to, by majority vote, control streams and rivers in *Idaho,* Oregon and Washington as they relate to anadromous fish. It can be clearly seen that the geographical relationship between Washington and Oregon would make the interests of those two states nearly identical while Idaho's interests would be much different. This would allow Washington and Oregon to combine to outvote Idaho and effectively control Idaho's anadromous fisheries while Idaho would have little if any say in the management of the problem. The peculiar nature of the anadromous fish runs when combined with the inequitable procedure set out in Oregon's legislation would leave Idaho in a position no better than it now enjoys. The mere membership in the compact as outlined in Chapter 709, Oregon Laws of 1975, does not guarantee Idaho any protection against the further depletion of the salmon and steelhead runs returning to Idaho.

Further, there is no guarantee that, in the first instance, the State of Washington will pass, at the next plenary session of the legislature in January of 1977, a bill allowing Idaho to become a member of the compact. Even should the state of Washington pass such a bill in January of 1977, there is absolutely no

guarantee that the bill, as passed, would be acceptable to the State of Idaho nor does it guarantee that the bill would help to alleviate the problem of rapid depletion of the salmon and steelhead populations and their failure to return to the State of Idaho for spawning purposes. Plaintiff maintains further that the salmon and steelhead runs returning to Idaho are of such a small quantity that waiting until January of 1977 for a "possible" resolution of this problem will simply bring the entire Pacific Northwest closer to the day when salmon and steelhead runs are but a mere bit of history.

The United States appears to argue that the issues presented by Idaho's motion for leave to file complaint and brief in support thereof will become moot *if* Washington passes a bill allowing Idaho into the compact. This is in no sense true. As previously pointed out, the Oregon legislation is totally unsatisfactory and there is no guarantee that the state of Washington will pass legislation, let alone legislation which will be acceptable to the state of Idaho and the state of Oregon as required for compact membership. Under the test urged by the United States Government any issue that could, by any stretch of the imagination, possibly become moot in the future would not be tried in a court of law. It can be judicially noticed that no case is moot until it becomes moot, in fact.

The United States government at page three of their amicus curiae brief argues that the Plaintiff's request for an equitable apportionment and judicial supervision of the fishery will become unnecessary if Idaho is made an equal member of the compact. The assumption made by the United States is twofold: 1) that the state of Idaho will be made a member of the compact, and 2) that it will be made an *equal* member of the compact. Neither of the actions has happened and even if Idaho is made an "equal member" of the compact, Idaho's interests are sufficiently different from the nearly identical interests of the states

of Oregon and Washington that on many critical issues the state of Idaho could and would be outvoted by a vote of two to one. The admission of Idaho as a voting member of the Compact would not guarantee that the states of Washington and Oregon would not combine, because of their like interests, to defeat Idaho's interest in the steelhead and salmon runs. The Court should not, as the United States asks, decline to exercise its original jurisdiction. The United States in effect argues that if the Court simply declines to hear the case at this time, the problem will go away. The only things that will "go away" if action is delayed are the anadromous fish of the Pacific Northwest.

The steelhead and salmon decline is a problem which the states of Oregon, Washington and Idaho have been aware of for some time. Idaho has made many efforts to become a member of the compact and it appears to be more than coincidental that the Oregon legislature finally acted on a bill, even though unacceptable to the state of Idaho, to allow Idaho into the compact *after* the state of Idaho filed its motion for leave to file with this Court. If the Court should decline to exercise its jurisdiction at this time, there would be nothing that would keep the state of Oregon from repealing Chapter 709, Oregon Laws of 1975, and there would be no reasons, other than those ignored for many years in the past by the state of Washington, for the legislature in the state of Washington to pass legislation allowing Idaho into the Compact on terms acceptable to the Plaintiff.

The United States argues that this Court should decline jurisdiction and simply wait to see whether the problem can be worked out. The problem has not worked out in the past and that is the sole reason that the Plaintiff filed this action in the first instance. Further, the salmon and steelhead migration crisis can only be defined as just that; a crisis. The declining number of

salmon and steelhead re-entering Idaho for spawning has become disasterous to the State, its tourist industry, the sport fishermen and, more importantly, to the salmon and steelhead species themselves. It is respectfully suggested that any delay in the resolution of this matter could well be the death knell of the anadromous fish runs in the Pacific Northwest.

The United States argues in part II of their brief at page 4, that the United States is an indispensable party to this litigation. Plaintiff, state of Idaho, maintains that the United States is not an indispensable party to this action in that Plaintiff seeks merely an adjustment of the rights between the states of Washington and Oregon as to the proper apportionment of fish resources to grant Idaho its fair share of the runs as well as to continue the species. Plaintiff recognizes that various Indian tribes of the Pacific Northwest have treaty guaranteed fishing rights. *Department of Game* v. *the Puyallup Tribe*, 414 US 44 (1973); and *United States* v. *State of Washington*, 520 Fed 2d, 676 (1975), Court of Appeals 9, *cert. denied*, January 26, 1976 (75-588, 75-592, and 75-705). It is Plaintiff's contention that these cases recognize pre-existing Indian treaty rights allowing them to take certain numbers of fish from their native fishing grounds. However, the protection of these treaty rights and the day-to-day management of the fisheries from which the Indians remove their treaty-right allotment are to be governed by the states in which the Indian tribes reside, subject to the guidelines as set out in those cases. Therefore, the states of Oregon and Washington can and will represent the rights of the tribes in this lawsuit and the United States is not an indispensable party. Both cases cited above support these propositions. Likewise, the pre-existing treaty rights of the Nez Perce Tribe of Idaho were determined in *So Happy* v. *Smith*, 302 Fed Supp 899, 904 (D Oregon).

In *United States* v. *State of Washington*, 520 Fed 2d 676

(1975), the Court was presented with an appeal from a decision in the western district of Washington. The Ninth Circuit Court of Appeals upheld, in almost all particulars, the decree of the District Court which held that the State and its agencies can regulate *off-reservation* fishing by treaty Indians at their usual and customary grounds only if the State first satisfies the Court that the regulation is reasonable and necessary for conservation. The lower court also awarded the Indians the right under treaties to fifty percent of the harvest at their "usual and accustomed grounds and stations."

The State of Idaho in no way seeks to interfere with the fifty percent figure as established in that case and reaffirmed by the Ninth Circuit Court of Appeals. The State of Idaho merely seeks a decision equitably apportioning the *remainder* of the anadromous fish in the drainage between and among the states of Washington, Oregon and Idaho. In *United States* v. *Washington,* the Ninth Circuit Court of Appeals specifically stated that the state may interfere with Indians' treaty rights to fish when necessary to prevent the destruction of a run of a particular species in a particular stream; i.e., for conservation purposes. Therefore any intervention on the part of the United States would be superfluous since the cases which are cited in the United States' brief specifically state that conservation laws aimed at the preservation of a species of fish on a river may be enforced even as against Indians with treaty rights.

Secondly, the prime thrust of the Plaintiff's complaint is to the effect that it is the states of Washington and Oregon, not the Indians, that are responsible for the depletion of the anadromous fish runs. The State of Idaho does not in any manner contend that the 50%-50% ratio is wrong nor does the complaint in any manner affect the Indians' rights to fish other than from the point of view that the state may make and enforce reasonable regulations in order to conserve a species of fish and that those

those regulations and enforcement procedures may run as against the Indians.

In the case of the *Department of Game* v. *the Puyallup Tribe*, 414 US 44 (1973), this Court was reviewing regulations prohibiting net fishing for certain species of fish which were applied to commercial fishing by the Puyallup Indians who, under a federal treaty, had the right to take fish at all accustomed places in common with all citizens. It does not appear from the reported opinion in that case that the United States was a party in any manner. Further, the Court held that State fishing regulations may be enforced against Indians where such control is necessary to conserve a species even if such enforcement affects treaty rights.

Plaintiff's complaint goes to the issue of an equitable apportionment of existing anadromous fish runs between and among the state of Idaho, the state of Washington, and the state of Oregon. Nowhere are the Indians named as Defendants nor does State of Idaho maintain that any decision rendered by this Court would be binding on them. Further, the United States at page four, of the United States' memorandum, states as follows:

> Since the tribe's fishing rights are guaranteed by treaties with the United States, the states are not free to divide up the fishery in such a way as to interfere with those rights.

Plaintiff does not argue this point but rather argues that an equitable apportionment of the fish to which the Indian treaty rights do not speak and to which the Indians are entitled under the decisions of *Department of Game* v. *Puyallup Tribe* and *United States* v. *State of Washington*, supra, may, and should, be decided without the intervention of the federal government. No rights of the Indians need be affected and because of the situation with the anadromous fish runs any decision of this Court regarding validity of state regulations or regulations

promulgated by the compact will be aimed at conservation measures, measures which have expressly been approved as within the state's police power regulation by the cases cited herein. The cases are specific as to: (1) the state may regulate Indian fisheries for the conservation of a species and, (2) that where states attempt only to determine their rights and obligations with regard to that portion of the anadromous fish runs to which the Indians have no entitlement by reason of treaty, the apportionment may be decided without the presence of the Indians or their trustee. There appears no valid reason that the Court should hold the United States to be an indispensable party in this matter. Further, even should the United States Government be determined to be an indispensable party, this is not an adequate reason for denial of the motion for leave to file.

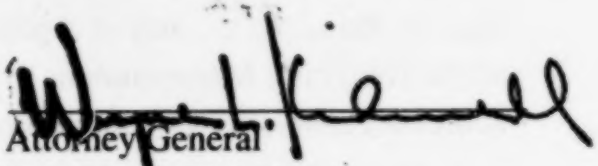
Therefore, this action may be litigated without the intervention of the United States government in that the rights of the states of Washington, Oregon, and Idaho will be determined and an equitable portion of the fish allotted to each state, while simultaneously taking into account the respective Indian treaty rights with which each state has been entrusted as a result of the case law cited above.

CONCLUSION

As stated repeatedly by the United States in its brief, the issue of an intervention by the United States need not be decided at this time. However, what does need to be decided at this time is whether or not the Court will decline to accept jurisdiction of this matter thereby putting off any meaningful solution to a rapidly deteriorating situation involving the salmon and steelhead runs for the entire Pacific Northwest and thereby endanger the survival of the species or, whether this Court will accept jurisdiction and determine the various states' interests and entitlements, thereby alleviating the crisis and protecting the anad-

romous fish migrations for future generations of Americans yet to come.

For the foregoing reasons, Plaintiff respectfully requests this Court to grant the motion for leave to file.



Attorney General
Counsel for Plaintiff

April, 1976

PROOF OF SERVICE

I, WAYNE L. KIDWELL, Attorney General, State of Idaho, attorney for Plaintiff herein, State of Idaho, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 9th day of April, 1976, I served three copies of the foregoing Memorandum by mailing the same in a duly addressed envelope, with airmail postage prepaid to:

1. Honorable Daniel J. Evans, Governor of the State of Washington, State Capitol, Olympia, Washington, 98104.

2. Honorable Slade Gorton, Attorney General of the State of Washington, Temple of Justice, Olympia, Washington, 98501.

3. Honorable Robert Straub, Governor of the State of Oregon, State Capitol, Salem, Oregon, 97310.

4. Honorable R. Lee Johnson, Attorney General of Oregon, 100 State Office Building, Salem, Oregon, 94310.

5. Robert E. Smylie, Counsel for Amici organizations, P.O. Box 2527, Boise, Idaho, 83701.

6. Robert H. Bork, Solicitor General, Department of Justice, Washington, D.C., 20530

Wayne L. Kidwell

Attorney General for
the State of Idaho
and Counsel for Plaintiff